## Public Prosecutor v Mohamad Idham bin Mohd Rahmat

HIGH COURT (PENANG) — CRIMINAL REVISON NO PA-43–3–09 OF 2021
MOHD RADZI ABDUL HAMID JC
3 DECEMBER 2021

*Criminal Law — Revision — Order by magistrate — Community service — Execution of community service order during COVID-19 pandemic — Whether court can order extension of the period for the performance of community service due to its expiry during Movement Control Order — Whether the Welfare Department could extend the time period by exercising an administrative function as the institution in charge of the community service — Criminal Procedure Code ss 293(1)(e) & 325 — Penal Code s 323*

The respondent was charged and convicted for an offence under s 323 of the Penal Code. He was sentenced as a youthful offender and an order was made pursuant to s 293(1)(e) of the Criminal Procedure Code ('the CPC')where he was required to perform community service for a total aggregate time of 180 hours to be completed within a period of six months commencing from the date of the order of 11 February 2020 and expiring on 10 August 2020 ('the order'). Due to the coronavirus pandemic ('COVID-19') and the movement control order issued by the Government of Malaysia ('MCO') which were in force during the material period of the order, the performance of the community service by the respondent was interrupted and operationally suspended causing his inability to complete the required aggregate hours of service within the stipulated period. As a result, the respondent had a balance of 117 hours yet to be performed. The State of Penang entered Phase 4 of the National Recovery Plan on 8 November 2021.The issues in this revision proceeding were: (a) whether the court can order the extension of the period for the performance of community service due to its expiry during Movement Control Order ('MCO'); and (b) whether the Welfare Department could extend the time period by exercising an administrative function as the institution in charge of the community service.

**Held**:

(1) When an offender was found guilty as charged, the criminal court must then pass sentence as provided under the law for that offence. The court was functus officio only after sentence was passed and such order on sentence, as the final order disposing of the case, must be executed as

ordered. Even where the punishments meted out involve youthful offenders, any order of court in that respect must be executed (see paras 12–15).

(2) The general scheme of the CPC and in particular the provisions of Chapter XXVII (Sentences and The Carrying Out of it), Chapter XXVIII (Suspensions, Remissions and Commutations of Sentences) and Chapter XLIV (Miscellaneous) do not envisage the suspension, deferment or modification to any sentence as ordered by court unless specifically provided for under limited circumstances as referred earlier. Therefore, it must have been the intention of the Legislature in drafting the CPC that any sentence ordered against an offender must be completely executed as ordered. Since the duty to pass sentence was an integral part of the CPC, a purposive approach in interpreting the duty and powers of the court in passing sentence under ss 173(m)(ii) and 183 of the CPC was also relevant. It must co-exist along with the power to pass sentence, the duty and power to ensure that the sentence was executed or completed as ordered so as to avoid any failure of justice. Once the court makes an order for community service, the offender must complete his pre-determined hours of service within the period as stated in the order. However, as the CPC was silent on whether the time period can be extended, the possibility of extension will depend very much on the terms of the order as stipulated by the court since s 293(1)(e) of the CPC allows the court to make provision of the nature of service, time, place and any conditions as may be specified by the court (see paras 17, 22 & 25).

(3) The court held the view that the necessary implication of the power to pass sentence was the ancillary power to extend any period for the complete execution or performance of any sentence, there must still be a provision of the law that enables the magistrate to exercise such power. In absence of any express provision on such power in the CPC, it falls to be determined if there are any express or inherent powers to do so under the Subordinate Courts Act 1948. The court agreed with the submission of the learned deputy public prosecutor that the provisions of s 99A and the Third Schedule of the Subordinate Courts Act 1948 do not provide the magistrate's court with such power and neither does the magistrate's court possess any power of inherent jurisdiction since such power only rests with the High Court. The court was of the view that the Welfare Department had no power to exercise such authority since it was not the authority that made the order for community service. The Welfare Department's role was merely to provide the mechanism and institution where the community service would be performed by the offender under the supervision of its officer (see paras 28–30).

(4) There were valid grounds for the exercise of the inherent jurisdiction of the court in this application. There was a clear justification for the court to decide in favour of extending the period for the performance of the community service as ordered by the magistrate. The purpose of sentencing as an integral part of the administration of justice cannot be frustrated by events that were not particularly provided for or foreseen by the law. Since the CPC does not make the express provision on the matter, there arises the need for this court to make such order as a necessary implication of the power of the magistrate's court to pass sentence. Furthermore, allowing the order to expire without completion of the community service will put the respondent at the risk of committing a breach of the order and consequently facing the prospect of punishment as provided for the offence under s 323 of the Penal Code. Thus, the extension of the period for completion of the community service not only serves the justice of enforcing the sentence but also serves the justice of allowing the respondent to complete the community service without risk of default since the inability to complete the aggregate hours of service was not due to his fault (see paras 32–33).

**[Bahasa Malaysia summary**

Responden telah dituduh dan disabitkan atas kesalahan di bawah s 323 Kanun Keseksaan. Dia telah dijatuhkan hukuman sebagai pesalah muda dan perintah telah dibuat menurut s 293(1)(e) Kanun Tatacara Jenayah ('KTJ') di mana dia dikehendaki melakukan khidmat masyarakat untuk jumlah masa selama 180 jam dalam tempoh enam bulan bermula dari tarikh pesanan 11 Februari 2020 dan tamat pada 10 Ogos 2020 ('perintah'). Disebabkan oleh pandemik koronavirus ('COVID-19') dan perintah kawalan pergerakan oleh Kerajaan Malaysia ('PKP') yang berkuat kuasa semasa tempoh penting perintah tersebut, khidmat masyarakat oleh responden telah terganggu dan digantung operasi menyebabkan ketidakupayaannya untuk melengkapkan tempoh jam khidmat masyarakat yang ditetapkan. Hasilnya, responden mempunyai baki 117 jam lagi. Negeri Pulau Pinang memasuki Fasa 4 Pelan Pemulihan Nasional pada 8 November 2021. Isu-isu dalam prosiding semakan jenayah ini adalah: (a) sama ada mahkamah boleh memerintahkan pelanjutan tempoh pelaksanaan khidmat masyarakat kerana tempohnya tamat semasa Perintah Kawalan Pergerakan ('PKP'); dan (b) adakah Jabatan Kebajikan Masyarakat boleh melanjutkan tempoh masa dengan menjalankan fungsi pentadbiran sebagai institusi yang bertanggungjawab dalam perkhidmatan masyarakat.

**Diputuskan**:

(1) Apabila pesalah didapati bersalah seperti didalam pertuduhan, mahkamah jenayah hendaklah menjatuhkan hukuman seperti yang diperuntukkan di bawah undang-undang untuk kesalahan tersebut. Mahkamah telah functus officio selepas hukuman dijatuhkan dan

perintah yang diberikan merupakan perintah terakhir yang memuktamadkan kes tersebut, haruslah dijalankan. Walaupun hukuman yang dikenakan melibatkan pesalah muda, sebarang perintah mahkamah mengenai perkara tersebut haruslah dijalankan (lihat perenggan 12–15).

(2) Peruntukan am KTJ khususnya peruntukan Bab XXVII (Hukuman dan Perlaksanaanya), Bab XXVIII (Penggantungan, Remitan dan Peringanan Hukuman) dan Bab XLIV (Pelbagai) tidak menggambarkan penggantungan, penangguhan atau pengubahsuaian kepada mana-mana hukuman seperti yang diperintahkan oleh mahkamah melainkan diperuntukkan secara khusus dalam keadaan terhad. Oleh itu, Badan Perundangan berniat ketika merangka KTJ tersebut bahawa sebarang hukuman terhadap pesalah mesti dilaksanakan sepenuhnya seperti yang diperintahkan. Memandangkan kewajipan menjatuhkan hukuman adalah sebahagian daripada KTJ, pendekatan bertujuan dalam mentafsir tugas dan kuasa mahkamah dalam menjatuhkan hukuman boleh dilihat di ss 173(m)(ii) dan 183 KTJ. Ianya wujud bersesama dengan kuasa untuk menjatuhkan hukuman, kewajipan dan kuasa untuk memastikan bahawa hukuman tersebut telah dijalankan seperti yang diperintahkan untuk mengelakkan sebarang kegagalan keadilan. Sebaik sahaja mahkamah membuat perintah untuk khidmat masyarakat, pesalah tersebut haruslah melengkapkan tempoh perkhidmatannya seperti yang telah ditetapkan. Walau bagaimanapun, memandangkan KTJ tidak menyentuh mengenai sama ada tempoh masa boleh dilanjutkan, kemungkinan pelanjutan bergantung pada terma perintah seperti yang ditetapkan oleh mahkamah memandangkan s 293(1)(e) KTJ membenarkan mahkamah untuk membuat peruntukan mengenai jenis perkhidmatan, masa, tempat dan sebarang syarat sebagaimana yang ditentukan oleh mahkamah (lihat perenggan 17, 22 & 25).

(3) Mahkamah berpendapat bahawa kuasa yang diperlukan untuk menjatuhkan hukuman ialah kuasa sampingan untuk melanjutkan tempoh bagi pelaksanaan lengkap atau pelaksanaan mana-mana hukuman, maka ada peruntukan undang-undang yang membolehkan Majistret melaksanakan kuasa tersebut. Sekiranya tiada sebarang peruntukan nyata mengenai kuasa tersebut dalam KTJ, maka mahkamah ini menilai sama ada terdapat sebarang kuasa nyata atau sedia ada di bawah Akta Mahkamah Rendah 1948. Mahkamah bersetuju dengan hujahan timbalan pendakwa raya terpelajar bahawa peruntukan s 99A dan Jadual Ketiga Akta Mahkamah Rendah 1948 tidak memberikan mahkamah majistret kuasa sedemikian dan mahkamah majistret juga tidak mempunyai sebarang kuasa bidang kuasa sedia ada memandangkan kuasa tersebut hanya terletak pada Mahkamah Tinggi. Mahkamah berpendapat bahawa Jabatan Kebajikan Masyarakat tidak mempunyai kuasa untuk melaksanakan kuasa tersebut kerana mereka bukan pihak berkuasa yang membuat perintah untuk khidmat masyarakat. Jabatan

Kebajikan Masyarakat hanya berperanan menyediakan mekanisme dan institusi di mana khidmat masyarakat dijalankan oleh pesalah di bawah seliaan pegawainya (lihat perenggan 28 & 30)

(4) Terdapat alasan-alasan yang sah untuk menjalankan bidang kuasa sedia ada mahkamah dalam permohonan ini. Terdapat alasan yang jelas bagi mahkamah membuat keputusan memihak kepada pelanjutan tempoh pelaksanaan khidmat masyarakat seperti yang diperintahkan oleh majistret. Tujuan menjatuhkan hukuman adalah sebagai sebahagian daripada pentadbiran keadilan tidak boleh dihalang oleh keadaan yang tidak diperuntukkan atau diramalkan secara khusus oleh undang-undang. Memandangkan KTJ tidak membuat peruntukan nyata mengenai perkara tersebut, maka timbul keperluan untuk mahkamah membuat perintah sedemikian sebagai perlaksanaan yang perlu terhadap kuasa mahkamah majistret untuk menjatuhkan hukuman. Tambahan pula, membenarkan perintah tersebut tamat tempoh tanpa menyempurnakan khidmat masyarakat akan meletakkan responden pada risiko pelanggaran perintah dan seterusnya berdepan dengan prospek hukuman seperti yang diperuntukkan bagi kesalahan di bawah s 323 Kanun Keseksaan. Oleh itu, lanjutan tempoh untuk melengkapkan khidmat masyarakat bukan sahaja memenuhi keadilan untuk melaksanakan hukuman tetapi juga memenuhi keadilan untuk membenarkan responden menyelesaikan khidmat masyarakat tanpa risiko ingkar kerana ketidakupayaan untuk melengkapkan tempoh khidmat masyarakat yang mana bukan kerana kesalahannya (lihat perenggan 32–33).]

**Cases referred to**

*Ahmadi bin Yahya v PP* [2012] 6 MLJ 37; [2012] 7 CLJ 113, CA (refd)
*Ch'Ng Poh @ Ch'Ng Chong Poh v Pendakwa Raya* [2016] MLJU 1406, HC (refd)
*Karpal Singh & Anor v PP* [1991] 2 MLJ 544, SC (refd)
*Maleb bin Su v PP* [1984] 1 MLJ 311; [1984] 2 CLJ 232 (refd)
*PP v Jamalul Khair* [1985] 1 MLJ 316; [1984] 1 LNS 161 (refd)
*PP v Tay Jui Kwang and Others* [2006] MLJU 610; [2007] 10 CLJ 609, HC (refd)
*PP v Yap Min Woie* [1996] 1 MLJ 169; [1995] 4 CLJ 692, FC (refd)
*R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 3 All ER 1, HL (refd)
*Sinnathurai Subramaniam v PP* [2011] 5 CLJ 56, CA (refd)
*Tan Bok Yeng v PP* [1972] 1 MLJ 214; [1972] 1 LNS 145 (refd)
*Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; [2020] 7 CLJ 561, FC (refd)

A *Wong Kim Woon v PP* [1999] 5 MLJ 114, HC (refd)

**Legislation referred to**

Courts of Judicature Act 1964 s 31, Part XVI
Criminal Procedure Code ss 173(m)(ii), 183, 275, 278, 284, 292, 293(1)(e), 325, Chapters XXVII, XXVIII, XLIV
Juvenile Courts Act 1947 (repealed by Child Act 2001) s 28
Penal Code s 323
Subordinate Court Rules 1955
Subordinates Court Act 1948 s 99A, Part XVII, Third Schedule
Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 ('COVID-19') Act 2020

*Khairul Anuar bin Abdul Halim (Deputy Public Prosecutor, Penang State Legal Advisor's Office) for the applicant.*
*The respondent representing himself.*

**Mohd Radzi Abdul Hamid JC:**

PREFACE

**[1]** By a letter dated 9 July 2021 the prosecution wrote to this court seeking this court's powers of revision with regards to the question whether this court can order the extension of the period for the performance of community service made by the magistrate pursuant to s 293(1)(e) of the Criminal Procedure Code ('the CPC') which expired before the full completion of the total aggregate hours of service due to the Movement Control Order issued by the Government of Malaysia at the material time ('application').

BACKGROUND

**[2]** The respondent (Mohamad Idham bin Mohd Rahmat) was charged and convicted for an offence under s 323 of the Penal Code. He was sentenced as a youthful offender and an order was made pursuant to s 293(1)(e) of the Criminal Procedure Code where he was required to perform community service for a total aggregate time of 180 hours to be completed within a period of six months commencing from the date of the order of 11 February 2020 and expiring on 10 August 2020. The order of the magistrate is hereafter referred to as the 'order'.

**[3]** Due to the coronavirus pandemic ('COVID-19') and the Movement Control Order issued by the Government of Malaysia which were in force during the material period of the order, the performance of the community service by the respondent was interrupted and operationally suspended causing his inability to complete the required aggregate hours of service within the

stipulated period. As a result the respondent has a balance of 117 hours yet to be performed. The State of Penang entered Phase 4 of the National Recovery Plan on 8 November 2021.

HEARING OF THE APPLICATION

**[4]** At the hearing of the application the respondent was present and not represented by legal counsel. This court enquired if he intended to oppose the application and seek legal representation. The respondent informed this court that he did not wish to oppose the application and left the matter to be decided by this court.

**[5]** The learned deputy public prosecutor sought for this court to exercise its inherent jurisdiction to order the extension of the period for the performance of the community service under the order so that the sentence as ordered by the magistrate will not be frustrated rendering the sentence only partially completed.

**[6]** It was submitted that the invocation of this court's inherent jurisdiction is necessary since the CPC is silent on the matter of execution of sentence frustrated by intervening events such as a pandemic. Further to that, s 99A and the Third Schedule to the Subordinate Courts Act 1948 do not provide for any powers to the magistrate to extend the period of community service.

**[7]** In support of his submission that this court can and should exercise its inherent powers in this application reference was made to the Supreme Court decision in *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544 where it was held:

> In matters like criminal law of a purely domestic nature, our view is that the court will only exercise its inherent powers when there is miscarriage of justice. The court must be careful that the decision is not in conflict with the intention of the legislature as indicated in statutory powers. The inherent power apparently cannot be invoked to override an express provision of law or when there is another remedy available. Where the legislature has provided a particular mode of action or has vested an authority with powers to act in a particular manner and has prescribed the conditions limiting the scope of such action, the court cannot act outside those powers and conditions.

**[8]** Reference was also made to the High Court decision in *Ch'Ng Poh @ Ch'Ng Chong Poh v Pendakwa Raya* [2016] MLJU 1406 where it was held:

> In another case of: *Ahmadi bin Yahya v Public Prosecutor* [2012] 6 MLJ 37; [2012] 7 CLJ 113 (CA) the Court of Appeal also made reference to an article entitled 'The Inherent Jurisdiction of the Court' by Sir Jack Jacob which stated as follows:

> ... the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called 'inherent'. This description has been criticized as being 'metaphysical', but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner ...

**[9]** Premised on those submissions learned deputy public prosecutor argued that if this court were to not exercise its inherent powers to extend the period of the order the sentence that was passed according to law will not be completely executed. The respondent will be prematurely released from serving his full sentence and this will result in a failure in the administration of justice.

## POWER OF REVISION

**[10]** The power of revision by the High Court are found in s 31 of the Courts of Judicature Act 1964 and s 325 of the CPC:

> Courts of Judicature Act
>
> 31 Revision of criminal proceedings of subordinate courts
>
> The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.
>
> Criminal Procedure Code
>
> 325 Powers of Judge on revision
>
> (1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.
>
> (2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.
>
> (3) Nothing in this section shall be deemed to authorize a Judge to convert a finding of acquittal into one of conviction.

**[11]** It is well established law that the court will generally exercise its revisionary powers where the lower court fails to comply with the provisions of the law, the decision is grossly erroneous, the findings of fact are not supported by evidence, material evidence of the parties are not considered, there has been an error of law or procedure and where the revision is demanded in the interest of public interest. The primary objective of a revision is to correct a miscarriage of justice and the High Court's powers of revision are to be exercised sparingly and judiciously.

AN EVALUATION OF THIS APPLICATION

*Passing sentence as part of the administration of justice*

**[12]** When an offender is found guilty as charged the criminal court must then pass sentence as provided under the law for that offence. The court is functus officio only after sentence is passed and such order on sentence is the final order disposing of the case (see *Public Prosecutor v Jamalul Khair* [1985] 1 MLJ 316; [1984] 1 LNS 161; and *Maleb bin Su v Public Prosecutor* [1984] 1 MLJ 311; [1984] 2 CLJ 232). Once the judgment is recorded the magistrate court as in the present matter cannot alter that judgment (see s 278 of the CPC).

**[13]** Sentencing is about crime control and public protection. In passing sentence a court is serving the role appointed by society to ensure that offenders are punished and in that process it is hoped that criminally minded members of society will be deterred from committing crimes. In *Sinnathurai Subramaniam v Public Prosecutor* [2011] 5 CLJ 56, the Court of Appeal through Abdul Malik Ishak JCA expressed the following views:

> [14] The purpose of the penal system is to reduce crime and at the same time to make offenders realise that they have to obey the criminal law. It cannot be denied that punishment under the Penal Code is justified on account of two objectives. Firstly, the reduction of crime. Secondly, the promotion of respect for the criminal law.
>
> [15] What Professor Nigel Walker said in 'sentencing in a rational society' that, 'no society can afford a policeman at everyone's elbow' must surely apply to every penal system. For criminal law to be implemented successfully, the practice of punishing offenders and the type of punishment to be meted out to offenders must be accepted by society.
>
> [16] I am of the considered view that the justification of the practice of punishment is to reduce crime. And this is manifested by deterring potential offenders or by deterring the individual offender from committing the same crime again. In reality, if punishment is to deter it may only be effective by giving offenders their just deserts. That is the only way to deter offenders and would be offenders.

A [17] There is no statute that carries a general statement of the aims which sentencers should seek and strive to achieve. But judges have developed the law on sentencing with a sense of purpose ...

[21] Essentially, sentencing is about crime control and public protection. These can readily be achieved through deterrence, prevention and rehabilitation. Retribution
B is also important and it does play a role.

**[14]** Therefore, when sentence is passed as the final order in a criminal proceedings it must be executed as ordered. It is implicit in the CPC that unless the conviction and sentence is stayed pending an appeal or set aside following
C an appeal or revision or reduced due to a requirement of law (see s 275 of the CPC on the substitution of death sentence with life imprisonment for an pregnant woman) or suspended (see s 284 of the CPC on suspension of sentence pending payment of fine) or substituted with a different type of
D sentence (see s 291 when whipping cannot be inflicted) or suspend, remitted or commuted by the Ruler of a State, then the sentence must be executed as ordered. The intention of the law that an offender must face his punishment can also be seen in s 292 of the CPC where an escaped convict must equally serve his imprisonment sentence.

E

**[15]** Even where the punishments meted out involve youthful offenders, any order of court in that respect must be executed. Age may be a mitigating factor but in every case, the merits of age must be considered against the type and nature of crime committed. In essence, being a youthful offender does not does
F not necessarily merit lighter sentence. Sharma J in *Tan Bok Yeng v Public Prosecutor* [1972] 1 MLJ 214; [1972] 1 LNS 145 stated:

... I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the
G dare, dash and defiance of the youth alone is capable of performing and producing. Law cannot, in my view, remain merely a static and a meaninglessly passive, if ornamental and an orthodox instrument of justice, ineffective in its results and application. The social needs of the times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interest have also to be borne in mind. In certain types
H of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society.

*Community service pursuant to s 293(1)(e) of the CPC*

I **[16]** Section 293(1)(e) of the CPC was introduced via the Criminal Procedure Code (Amendment) Act 2006. Community service was introduced as an alternative form of punishment against youthful offenders. A youthful offender is one who is above the age of 18 but below 21 years. That section provides that a youthful offender can be ordered to perform community service

not exceeding 240 hours aggregate subject to conditions of time as may be specified by the court. There is no minimum or maximum time limit set by the provision. It is left to the estimation of the court the period of time that may be reasonably required to complete the community service.

**[17]** Once the court makes an order for community service, the offender must complete his pre-determined hours of service within the period as stated in the order. However, the CPC is silent on whether the time period can be extended. In that circumstance, the possibility of extension will depend very much on the terms of the order as stipulated by the court since s 293(1)(e) of the CPC allows the court to make provision of the nature of service, time, place and any conditions as may be specified by the court. If the terms provide for the possibility of extension of time then such period can be extended upon fulfilment of any conditions that may have been set. In absence of such terms, then the community service must be completed within the period stated in the order.

*The order in the present matter*

**[18]** The order in the present application provided that the aggregate hours to be performed by the respondent is 180 hours to be completed within a period of six months. The community service to be performed shall be under the supervision of the Welfare Department. In the event the respondent commits three defaults consecutively in the performance of the services without any reasonable cause, he shall be deemed to have committed a breach of the order and he shall be liable to be brought to court and sentenced according to the sentence provided for that offence. There are no terms regarding the possibility of extension of time to perform the services.

**[19]** Thus, in absence of any term in the order permitting the extension of time and in the absence of an express provision in the CPC allowing for the extension of such time, it would appear that the time period for the performance of the community service would expire at the end of the period as specified by the court.

*The COVID-19 Act*

**[20]** Since this application is made arising from the effects of the Movement Control Order and the COVID-19 pandemic, a reference to the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 ('COVID-19') Act 2020 ('the COVID Act') would be necessary. Whilst there are provisions modifying Part XVI of the Courts of Judicature Act 1964, Part XVII of the Subordinates Court Act 1948 and the Subordinate Court Rules 1955 under Part XVIII of the Act, the modifications are restricted to

empowering the Chief Justice to suspend or modify the rules of court for doing complete justice in any cause or matter pending before the courts and to issue any direction relating to the business of the courts as may be necessary. The modifications do not extend to any law specific to criminal proceedings such as the CPC.

**[21]** The granting of a power to the courts under the COVID-19 Act to extend any period for the execution or performance of sentence where any time period is prescribed such as the performance of community service under s 293(1)(e) of the CPC would have been convenient in addressing the issue of interruptions to the execution or performance of such sentence. Since the COVID-19 Act does not make such provisions, it can be assumed that despite the effect of COVID-19 pandemic on many aspects of the administration of justice such as the closure of courts, delays in the hearing of trials and modification of procedures on how criminal applications and appeals are to be heard, there is no intention by the government to provide any modifications to Chapter XXVII (Sentences and the Carrying Out of it) of the CPC.

*The principle of ex necessitate legis and necessary implication*

**[22]** It is plainly clear in this court's view that the general scheme of the CPC and in particular the provisions of Chapter XXVII (Sentences and the Carrying Out of it), Chapter XXVIII (Suspensions, Remissions and Commutations of Sentences) and Chapter XLIV (Miscellaneous) do not envisage the suspension, deferment or modification to any sentence as ordered by court unless specifically provided for under limited circumstances as referred earlier. Therefore, it must have been the intention of the Legislature in drafting the CPC that any sentence ordered against an offender must be completely executed as ordered.

**[23]** It is only sensible and logical to state that it could not be expected that the CPC as any other legislation will contain all the details and eventualities involved in its application, more so when the eventuality is something that could not have been foreseen such as a pandemic. Thus, to ensure that any sentence passed such as community service is completely executed and performed then such order must be capable of being extended in the event of the occurrence of any matter or event that interferes with the complete performance of that sentence. The duty and power given by legislation to the court to pass sentence according to law following the finding of guilt of an accused (see ss 173(m)(ii) and 183 of the CPC) must then also include the necessary and ancillary power to the court to extend any period for the completion of any sentence that may be interrupted due to unforeseen and extenuating circumstances beyond the control and power of the institution entrusted with the execution or supervision of the same so. Such power is a

necessity of the law to give effect to the powers already granted — *ex necessitate legis*. A

**[24]** It must also be a logical consequence and necessary implication that flows from the provisions on sentencing construed in their context as found in Chapter XXVII (Sentences and the Carrying Out of it) that any sentence passed according to law must, unless provided by law, be completely executed or performed. To allow otherwise would lead to a failure in the administration of justice and such a failure could not have been intended by the legislation. As held by the House of Lords in *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 3 All ER 1: B C

> A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation. D

**[25]** Since the duty to pass sentence is an integral part of the CPC, a purposive approach in interpreting the duty and powers of the court in passing sentence under ss 173(m)(ii) and 183 of the CPC is also relevant. There must co-exist along with the power to pass sentence, the duty and power to ensure that the sentence is executed or completed as ordered so as to avoid any failure of justice. As decided by the Federal Court in *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; [2020] 7 CLJ 561: E F

> In our opinion, the rules governing statutory interpretation may be summarised as follows. First, in construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the Legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited'. Third, the relevant provisions of an enactment must be read in accordance with the legislative G H I

purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself.

**[26]** Thus the duty and power to the court to pass sentence according to law as provided under the CPC must justify a construction and interpretation of that provision to mean such duty and power comes with the duty and power to ensure complete execution or performance of any sentence. Otherwise the CPC will be lame and devoid of any effect as a piece of legislation that is a crucial part of the administration of justice. In other words, it will become a gun without a bullet.

*The power to extend the community service period*

**[27]** As stated earlier, any judgment or order on sentence passed by the magistrate court is final. In the context of the present application the order for the performance of community service and their terms are final. They cannot be reviewed, modified or altered by the magistrate court (see s 278 of the CPC). As discussed earlier once the magistrate has passed sentence, he or she is *functus officio.* As such the magistrate cannot alter the judgment (see *Public Prosecutor v Tay Jui Kwang and Others* [2006] MLJU 610; [2007] 10 CLJ 609).

**[28]** Notwithstanding that this court holds the view that the necessary implication of the power to pass sentence is the ancillary power to extend any period for the complete execution or performance of any sentence, there must still be a provision of the law that enables the magistrate to exercise such power. In absence of any express provision on such power in the CPC it falls to be determined if there are any express or inherent powers to do so under the Subordinate Courts Act 1948. This court agrees with the submission of the learned deputy public prosecutor that the provisions of s 99A and the Third Schedule of the Subordinate Courts Act 1948 do not provide the magistrate court with such power and neither does the magistrate court possess any power of inherent jurisdiction since such power only rests with the High Court (see *Karpal Singh & Anor v Public Prosecutor*).

**[29]** Moving on, can the Welfare Department extend the time period by exercising an administrative function as the institution in charge of the

community service? In this court's view the Welfare Department has no power to exercise such authority since it is not the authority that made the order for community service. The Welfare Department's role is merely to provide the mechanism and institution where the community service will be performed by the offender under the supervision of its officer. On this point, reference is made to the Federal Court in *Public Prosecutor v Yap Min Woie* [1996] 1 MLJ 169; [1995] 4 CLJ 692 where it was decided that the High Court did not have the power to shorten the period of detention made under s 28 of the Juvenile Courts Act 1947:

> The issue here is whether the High Court judge has the power or the discretion to reduce the period of detention from three years to one year. Our answer is that under s 28 of the Act, he is not empowered nor has he the discretion to shorten the period of detention. The power to order a juvenile to be sent to an approved school is bestowed under the Act to the Juvenile Court, and that order shall be an authority for the juvenile's detention for a period of three years. Under the proviso (a), it is further stipulated that only the board of visitors of the approved school to which the juvenile was sent, may in their absolute discretion, for reasons which appeared to them to be sufficient, shorten the period of detention.

**[30]** Thus, it falls on this court in the exercise of its powers of revision and supervision to draw such power from the inherent jurisdiction of this court to avoid any miscarriage of justice in a situation where a sentence passed according to law is at risk of not being fully executed or completed.

**[31]** The judicial basis of the inherent jurisdiction of the court was discussed in the Court of Appeal decision in *Ahmadi bin Yahya v Public Prosecutor* [2012] 6 MLJ 37; [2012] 7 CLJ 113, where His Lordship Azhar Mohamed JCA (as he then was) in delivering the decision of the court referred to an article by Sir Jack Jacob on the subject:

> [29] In his illuminating article entitled 'The Inherent Jurisdiction of the Court' 1970 Current Legal Problems 23, Sir Jack Jacob explained the juridical basis of inherent jurisdiction of court as follows:
>
> > ... the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called 'inherent'. This description has been criticized as being 'metaphysical', but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to

A law in a regular, orderly and effective manner.

**[32]** In this court's view, there are valid grounds for the exercise of the inherent jurisdiction of this court in this application. There is a clear justification for this court to decide in favor of extending the period for the performance of the community service as ordered by the magistrate. The purpose of sentencing as an integral part of the administration of justice cannot be frustrated by events that were not particularly provided for or foreseen by the law. Since the CPC does not make the express provision on the matter, there arises the need for this court to make such order as a necessary implication of the power of the magistrate court to pass sentence. There is a legitimate expectation and requirement for this court to fulfil that need. As decided in *Wong Kim Woon v Public Prosecutor* [1999] 5 MLJ 114:

> A statute, even more than a contract, must be construed, *ut res magis valeat quam pereat,* so that the intentions of the legislature may not he treated as vain or left to operate in the air: *Curtis v Stovin* (1889) 22 QBD 512 at p 517, *Hawtrey v Beaufront Ltd* [1946] KB 280.

**[33]** Furthermore, allowing the order to expire without completion of the community service will put the respondent at the risk of committing a breach of the order and consequently facing the prospect of punishment as provided for the offence under s 323 of the Penal Code. Thus, the extension of the period for completion of the community service not only serves the justice of enforcing the sentence but also serves the justice of allowing the respondent to complete the community service without risk of default since the inability to complete the aggregate hours of service was not due to his fault.

DECISION

**[34]** In exercise of its powers of revision and supervision and in further exercise of its powers of inherent jurisdiction this court hereby order that the period for the performance of community service by the respondent under the order of the magistrate dated 11 February 2020 be extended upon the following terms. The calculation of the extension is made taking into account the expiry date of the initial period, the date when the State of Penang entered Phase 4 of the National Recovery Plan on 8 November 2021 and the hearing of this application on 11 November 2021. Therefore:

(a) the period for the performance of community service under the order of the magistrate dated 11 February 2020 is extended for a period of 20 months commencing from the date of 11 August 2020; and

(b) all other orders of the magistrate under items (a), (b), (c) and (e) shall remain.

*Order accordingly.*

Reported by Muhamad Azham Marwan